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IN THE SUPREME COURT OF
THE STATE OF IDAHO

IN THE MATTER OF THE DRIVER'S
LICENSE SUSPENSION OF BRYAN
LEE MCDANIEL.

Docket No. 36744

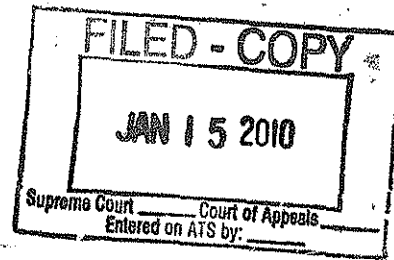
BRYAN LEE MCDANIEL

Petitioner-Appellant

vs.

STATE OF IDAHO, DEPARTMENT
OF TRANSPORTATION

Respondent.



APPELLANT'S BRIEF

Appeal from the District Court of the Third Judicial District of the State of Idaho,
in and for the County of Canyon

Honorable Gregory S. Culet
District Judge, Presiding

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STATEMENT OF CASE

This is an appeal from the ruling of the District Court sustaining the decision of the hearing officer appointed by the Department of Transportation suspending the driving privileges of Bryan McDaniel.

STATEMENT OF FACTS

On June 20, 2008, the Petitioner, Bryan McDaniel, his uncle Billy McDaniel and Tyrone Relka were working on a dune buggy that they had just purchased. The dune buggy was in poor condition. They had started working on the vehicle at about two o'clock in the afternoon and got it running about 6:30 p.m. This was a Friday afternoon. During the course of the afternoon Petitioner drank some beer. At about 7 p.m. he drove the dune buggy from the premises located at 16257 Logan St., Caldwell, Idaho across Logan and then down a dirt lane then back to his property. The lane was private property. The dune buggy was doing approximately five miles per hour, when the police officer arrived and stopped the vehicle. (Administrative License Hearing [hereinafter ALS] Tr. P. 10, l. 2-6) Petitioner started drinking the beer at about 2:30 p.m. and drank three beers between then and 7:00 p.m. approximately one-half hour before the police officer arrived. (ALS Tr. P. 10, l. 17-20, P. 11, l. 2-8) Petitioner had driven the vehicle about fifty yards up Logan Street at a speed of about five to ten miles per hour. (ALS Tr. P. 12,

l. 12-13) At that point he turned on to the private lane. He was not driving any faster than that because they had just got the vehicle in running condition and wanted to make sure it was holding oil pressure and it shifted properly. (ALS Tr. P. 12, l. 14-22) McDaniel told the officer that during the afternoon he had drank three beers. (ALS Tr. P.12, l. 23-25) McDaniel was arrested by the officer and taken to the Canyon County Jail. He was requested to blow in the Intoxilyzer 5000 breath test machine and did so. Exhibit #3 of the record on appeal is the read out of the machine. The read out is almost illegible but the officer wrote on the citation issued to Petitioner that the reading by the machine indicated a blood alcohol content of .083/.083. (See Exhibits 3 and 7) The officer provided the Petitioner with a copy of the "Notice of Suspension for Failure of Evidentiary Testing" form which on its face is defective because the officer did not indicate the "date of service" of the Notice. A second notice of suspension was served by the Department of Transportation on June 30. A request was timely requested and a hearing was held before an Administrative Hearing Officer appointed by the Department on August 6, 2008. The Hearing Officer sustained the suspension of Petitioner's license by Findings of Fact and Conclusions of Law and Order dated August 14, 2008. From such Order this appeal was taken pursuant to Idaho Code 18:8002A(8).

The Petitioner by profession is a long haul truck driver. He is an owner-operator, and his truck was leased to Willis Shaw Trucking. He has over three million miles of truck driving without an accident. His driving history has but two entries, a basic rule violation in California in 2004 and a damage information citation [a non-moving violation] in 2007.

His work depends upon having a valid license with a CDL endorsement pursuant to I.C. 49-104(7) and 49-105(16)(a)(b) and (c).

ISSUES ON APPEAL

1. **WHETHER AN INHERENT ERROR EXISTS IN THE INTOXILYZER MACHINE?**
2. **WHETHER IT WAS ARBITRARY AND AN ABUSE OF DISCRETION ON THE PART OF THE HEARING OFFICER NOT TO ACKNOWLEDGE THE INHERENT ERROR IN THE INTOXILYZER MACHINE?**
3. **WHETHER APPELLANT SHOULD BE ENTITLED TO THE BENEFIT OF THE INHERENT ERROR IN THE INTOXILYZER MACHINE?**

ARGUMENT AND AUTHORITIES

The Idaho Administrative Procedures Act (IDAPA) governs the review of department decisions to...suspend, disqualify, revoke or restrict a person's drivers license. The Court of Appeals has stated that:

In an appeal from the decision of the district court acting in its appellate capacity, under IDAPA, this Court reviews the agency record independently of the district court's decision. (citations omitted) This Court does not substitute its judgment for that of the agency as to the weight of the evidence presented. (citations omitted) This Court instead defers to the agency's findings of fact unless they are clearly erroneous. (citations omitted) In other words, the agency's factual

determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record. (citations omitted)

A court may overturn an agency's decision where its findings, inferences, conclusions, or decisions: (a) violate statutory or constitutional provisions;; (b) exceed the agency's statutory authority, (c) are made upon unlawful procedure; (d) are not supported by substantial evidence in the record; or (e) are arbitrary, capricious, or an abuse of discretion.

In Re Suspension of Driver's License of Gibbar, 143 Idaho 937 at 938, 155 P.3d 1176 (Ct. of Appeals, 2007)

At the hearing before the hearing officer appointed by the Department of Transportation, Petitioner presented the testimony of Loren Beals, a toxicologist. Mr. Beals curriculum vitae is attached to the Administrative record as Exhibit B. Mr. Beals testified that he was familiar with the Intoxilyzer 5000 breath machine and the operating manual for the machine.

Mr. Beals, addressing the actual test result of .083, testified that there was an actual variable in the machine itself which would indicate that the reading could be plus or minus what it actually was. In explaining that variable Mr. Beals stated:

"The operator's manual that the standardized approach from Idaho Department of Transportation says that you must run with each subject test what is called a simulator check. Simulator is a solution of alcohol in water through which you bubble air and it collects from that solution some of the alcohol vapor, and this is what is thought of as simulated breath. That is introduced into the machine. The typical target of this with subject testing is .08. It also is – a range is given and states that the operator can see if he is between .07 and .09, and if he is, then the results of the check are considered acceptable.

"There is another place in which the variability of the breath testing is implied, at least, and that is that the standard approach for breath testing is that two breath tests must be given, if possible, and that they must match within .02 percent of

each other. It also states that if the first two tests vary more widely than that, then a third test should be given; and if any two of the three then match within .02 of each other, that is considered an acceptable result.

“And really what is being said here is that it recognizes the variability inherent in breath testing, and if those ranges are allowed, then it stands to reason that on both the simulator check and the breath subject test that they could just as easily be within that range as well.” (ALS Tr. P. 26, l. 25; P. 27, l. 1-25; p. 28, l.1-6)

Finally, Mr. Beals was asked if he had an opinion within reasonable scientific certainty that the variable inherent in the machine could indicate a reading of .083 when in actual fact the actual BA of the Petitioner could be less than .08. To that question Mr. Beals answered “yes.” (ALS Tr. P. 29, l. 3) In response to the testimony of Mr. Beals, the Hearing Officer merely stated: “...Mr. Beals’s testimony that the breath machine contains an inherent variable that “could” have affected the test does not comport with the requirement of demonstration that the testing equipment was functioning improperly, and is also of a speculative nature.” (Administrative Record, P. 57)

The Intoxilyzer 5000 Operator’s Manual which Mr. Beals was familiar and used in part in formulating his opinion compares the operation of the machine and its testing with a “prior-art breath analyzer using volunteer drinkers and measuring the difference in readings between the two. Testing over time of three subjects there was a measuring variable of the Intoxilyzer 5000 of -.007 to +.016.

In the usual case concerning a suspension of a driver’s license the issue of the inherent variable in the machine operating normally would not be an issue. But when that variable could be greater than .004 which would result in a test of less than .08, that variable becomes a significant issue.

Using the Widmark formula and considering the height, weight, amount of consumption and time period involved Mr. Beals calculated by extrapolation that the blood alcohol concentration of Petitioner at the time of the driving to be between .062 and .072 and rising. (ALS Tr. P. 23, l. 1-20) The extrapolation testimony of the expert supports and corroborates the inherent error of the machine of at least .004. That variable would reduce the machine result of below .08.

The Hearing officer makes the following which Petitioner asserts is the error in the Hearing Officer's analysis. The Hearing Officer states: "While it is true that Mr. Beal's information and opinion may be enough to persuade a fact finder to acquit Licensee of the crime of driving under the influence, the ALS is driven by a different consideration. (Administrative Record, P. 56) The Hearing Officer then goes on to state that a drivers license shall be suspended when the test results indicate an alcohol concentration ...in violation of section 18-8004. He further states: "At the administrative hearing, the burden is on the Licensee to demonstrate either that the 'test results did show an alcohol concentration' in violation of Idaho Code Sec. 18-8004 [which they clearly do in this matter]; the 'tests for alcohol concentration...were not conducted in accordance with the requirements of Idaho Code Sec. 18-8004(4) [as to which no testimony was presented at the hearing]; or that the testing equipment was not functioning properly [as to which no testimony was presented at the hearing]. Hence under the statutory scheme, Mr. Beal's extrapolation testimony, though potentially relevant at the criminal trial of this matter, is not particularly helpful when viewed against the statutory scheme under the ALS." (Administrative Record, P. 56-57) The difficulty with the Hearing Officer's position is

logical only so far. The evidence presented went to the issue of an inherent error in the breath testing machine even if the machine is functioning as intended. The evidence presented by the Petitioner was sufficient to shift the burden on that point to the government. The government presented no evidence at all to rebut the inherent error factor. The government should have been obligated to produce evidence that there was no inherent variable in the machine. Of course the government would not have been able to do that. But again, the fact that such variable exists should be credited to the benefit of the Appellant. To the extent that the hearing officer did not address the inherent error variable, the hearing officer committed a reversible error.

The nature of a driver's license suspension is penal in nature. In this case suspension of the driver's license of the Petitioner because of such reading would result in an absolute suspension of his CDL upon which he bases his livelihood for period of one year. (I.C. Sec. 49-335(2)) It would destroy his professional ability to earn a living. That "inherent variable" is relevant to this proceeding and is not of a "speculative nature" as determined by the Hearing Officer.

The fact that an "inherent variable" exists in the machine is beyond question. That variable could place the result in the case below .08.

The Hearing Officer, therefore, committed error in his analysis of this matter and the suspension proceeding should be dismissed as against the Appellant. The Hearing Officer as much as admits that such error exists in the machine when he states that Mr. Beals' testimony may persuade a jury that he is not guilty of the offense of DUI. It certainly persuaded the prosecutor.

The Hearing Officer also charges Petitioner with the burden of proof to show that the statutory requirements were not followed here. As stated above the evidence presented by Appellant was sufficient to shift the burden regarding the inherent variable to the government. It was error for the Hearing officer not to recognize the evidentiary effect of Appellant's position at the hearing.

CONCLUSION

Based upon the foregoing, the decision made by the Hearing Officer in his Findings of Fact and Conclusions of Law and Order failed to account for the "inherent variability" in the Intoxilyzer 5000 breath test machine. Because of that variability the BA of the Petitioner could have been below the .08 BA required by Idaho Code 19-8004. The Petitioner is entitled to the benefit of that doubt. The Order sustaining the license suspension of Appellant should be set aside.

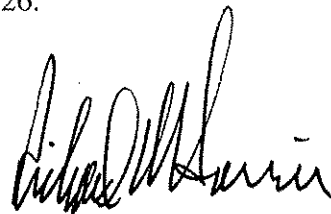
Dated this 15th day of January, 2010.

A handwritten signature in black ink, appearing to read "Richard L. Harris", written over a horizontal line.

RICHARD L. HARRIS
Attorney for Appellant

CERTIFICATE OF SERVICE

On this 15 day of January, 2010, the undersigned does hereby certify that a true copy of the foregoing document was served upon Timothy Stover, Attorney for the Respondent, by facsimile at 1-208-736-9929 and by United States Mail, postage prepaid to P.O. Box 5226, Twin Falls, Id. 83303-5226.

A handwritten signature in black ink, appearing to read "Richard L. Harris", is written over a horizontal line.

RICHARD L. HARRIS

